Tianza (Migration) [2022] AATA 495 (20 January 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Elwin Leon Tianza Mrs Veverlyn Ganado Tianza
REPRESENTATIVE:	Mr Newsam Antonio (MARN: 1683305)
CASE NUMBER:	2013697
HOME AFFAIRS REFERENCE(S):	BCC2019/5154377
MEMBER:	Peter Emmerton
DATE:	20 January 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decisions not to grant the applicants Regional Employer Nomination (Permanent) visas.

Statement made on 20 January 2022 at 1:18pm

CATCHWORDS
MIGRATION – Regional Employer Nomination (Permanent) (Class RN) visa – Subclass 187 (Regional Sponsored Migration Scheme) – false or misleading information – character declarations – criminal charges – deported from Guam – waiver of requirement – compassionate or compelling circumstances – interests of Australia – interests of an Australian citizen – decision under review affirmed

LEGISLATION
Migration Act 1958 (Cth), s 65
Migration Regulations 1994 (Cth), Schedule 2, cls 187.213, 187.311; Schedule 4, PIC 4020

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 19 August 2020 to refuse to grant the applicants Regional Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).

4. The applicants applied for the visas on 14 October 2019. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 187.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they were not satisfied that the requirements of cl.187.213 were met because the requirements of PIC 4020(1) were not met.

5. The applicant appeared before the Tribunal, via video, on 19 January 2022 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Beaumont, the visa applicant's employer representative.

6. The applicant was represented in relation to the review.

7. For the following reasons, the Tribunal has concluded that the decisions under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 187.213 for the grant of the visa. Broadly speaking, this requires that:

    - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

    - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

    - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

    - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

13. On 16 July 2020 the visa applicant was provided with a Natural Justice letter from the Department of Home Affairs. It stated the following

'Dear Elwin Leon TIANZA

Invitation to comment on information for a Regional Employer Nomination (subclass 187) visa

Adverse information received

We are currently processing your application. During this process we received unfavourable information that may lead to a decision to refuse your application.

Follow the instructions in this letter on how to reply and the timeframe for you to respond.

It is a requirement for the grant of a Regional Employer Nomination (subclass 187) visa that the applicant satisfies Public Interest Criterion (PIC) 4020 contained in clause 4020 of Schedule 4 to the Migration Regulations 1994. Subclause 4020(1) requires that there is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Administrative Appeals Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- *the application for the visa; or*

- *a visa that the applicant held in the period of 12 months before the application was made.*

If there is such evidence, subclause 4020(4) provides that PIC 4020(1)(a) or (b) and subclause 4020(2) will nonetheless be satisfied if the Minister is satisfied that:

- *compelling circumstances that affect the interests of Australia; or*

● *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*
justify the grant of the visa.

The following applicant(s) included on your application for Regional Employer Nomination (subclass 187) must satisfy the PIC 4020 requirement. This means that failure to satisfy PIC 4020 by any one of them may result in each person included in this application being refused the grant of this visa.

Elwin Leon TIANZA
Veverlyn Ganado TIANZA

As there is evidence suggesting that a person included in this application has provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application, the applicant(s) listed above may fail to satisfy PIC 4020(1), with the result that this visa application may be refused.

You (Elwin Leon TIANZA) lodged an application for a Temporary Work (Skilled) (subclass 457) Visa on 11 October 2016. That application was subsequently approved and you were granted a 457 visa on 30 November 2016 which you still hold to date.

In the online application form for the 457 visa, you provided information that is suspected to be false or misleading. Specifically, you answered 'no' to the following Character declarations:

● *Has any applicant ever been charged with any offence that is currently awaiting legal action?*

● *Has any applicant ever been convicted of an offence in any country (including any conviction which is now removed from official records)?*

● *Has any applicant ever been removed, deported or excluded from any country (including Australia)?*

When you submitted this visa application on 14 October 2019, you also answered 'no' the the above character declarations.

You have recently provided documents to the department as part of this visa application. The documents state that you were charged by Superior Court of Guam for Conspiracy to Commit Theft of Property held in Trust and Theft of Property held in Trust dated 8th of June 2012. The documents also state you were deported from Guam on the 8th of August 2012 and suggest that the criminal cases were closed due to your deportation.

This information, including your deportation, is in a material particular as is it relevant to the assessment of the character requirements for a 457 visa and a 187 visa. Your failure to declare this information is suspected to be false or misleading.

You may provide comment on the information that is suspected to be false or misleading in a material particular, and specify if you believe there are any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of any or all of PIC 4020(1) to justify the grant of the visa.'

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15. The visa applicant responded on 12 August 2020 and uploaded a series of documents in response to the invitation to comment letter including, a submission from the authorised migration agent addressing comments, copy of an international police check report (check by name - no finger prints) provided by a third party, letters of support from the business Director and the Finance & Systems Manager, recommendation letter from the Philippine Consul General to the Northern Territory, and letters of support from brother and friends.

16. The representative acknowledged in his response to the department that, '*The DHA have received documents that the applicant was charged by the Superior Court of Guam for Conspiracy to Commit Theft of Property held in Trust and Theft of Property held in Trust which resulted for applicant's deportation.*

We therefore submit on this letter the reasons why the applicant will be able to satisfy the PIC 4020 by requesting the delegate of DHA to waive the requirements of any or all of PIC 4020(1).'

17. The information contained in paragraphs 11-13 of this decision was tested during the hearing and the applicant stated that these facts were correct.

18. The Tribunal was not presented with any evidence to demonstrate that the failure to provide true and accurate information on the visa applications was done so unwittingly. The Tribunal has formed the view that an element of fraud or deception by the visa applicant was involved. The Tribunal finds it implausible that the visa applicant did not know he was charged with '*Conspiracy to Commit Theft of Property'* and was subsequently deported from Guam. This view is reinforced by the timing of the admission that false information had been provided only occurred after the department had raised the issue in their Natural Justice letter dated 16 July 2020, upon receipt of the new information provided by the visa applicant. This information resulted from the provision of Police and Court checks undertaken in Guam at the behest of the Department.

19. The Tribunal takes the matter of false or misleading statements given during a visa application process very seriously. These documents and associated procedures provide one of the key pillars to our border security and as such the Tribunal views the legal responsibilities associated with them as sacrosanct.

20. The Tribunal has concluded that as a result of this corroborated evidence the applicant has given information that is false or misleading in a material particular in relation to a visa the applicant held in the period of 12 months before the application was made.

21. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

22. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

23. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

24. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

25. **Consideration of compelling circumstances that affect the interests of Australia**

26. The Tribunal has considered the submissions provided by the nominator and the visa applicant's representative and their claims regarding the valuable contribution the applicant makes to their organisation and subsequently the people who use his employer's services. The Tribunal acknowledges that the applicant is 1 member of a skilled team of 60-70 and that his absence will have some negative impact.

27. A letter in support of the visa applicant from the Philippine Consul General to the Northern Territory, which discusses the importance of the visa applicant's contribution to the community has also been considered by the Tribunal.

28. The Tribunal has also considered the letters of support from various members of his employer, friends, Church and associates.

29. The Tribunal accepts that it may be difficult to recruit a replacement because of current Covid 19 restrictions which have put greater stress on recruitment, employee attraction and retention. It also accepts the argument that obtaining suitable employees in the Northern Territory is challenging. However, this has long been the case and it is up to an employer to develop strategies, succession plans, training and remuneration structures to attract and retain valued or essential staff, when there are negative employment and retention factors at play. The Tribunal whilst acknowledging the challenges, has not been persuaded that this will be any greater than any functional member of a team exiting an organisation for any myriad of reasons, as is commonly experienced in all workplaces including those operating in the Northern Territory.

30. After consideration of all the applicant's claims and supporting evidence, presented prior to the hearing and during the hearing, the Tribunal is not satisfied that Australia's trade or business opportunities would be significantly adversely affected or that Australia would miss out on a significant benefit to its business or economic opportunities if the applicant were not granted the visa.

31. The Tribunal again acknowledges that it is fair to assume the loss of a long-standing, well regarded staff member, will be in some ways detrimental to the organisation. It does not however form the view that the visa applicant is operating at a level that the loss can be classified as 'compelling circumstances' in relation to Australia.

Consideration of compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen

32. The Tribunal, as previously stated, appreciates that the business interests of the nominator/employer associated with the visa applicant Mr Tianza, will be likely to suffer a negative impact if the visa applicant is unable to continue in their employ. It repeats its' understanding that it may be challenging to replace this individual who performs an important task within a large team in relation to their business.

33. It accepts there may be stress placed on the business and a potential loss of income. It acknowledges the expertise which is likely to be lost to the business and potential training facilitated by an experienced employee when inducting new individuals into the business. However, this has long been the case and it is up to an employer to develop strategies, succession plans, training programs and remuneration structures to attract and retain valued

or essential staff, when there are negative employment and retention factors at play. The Tribunal whilst acknowledging the challenges, has not been persuaded that this will be any greater than any functional member of a team exiting an organisation for any myriad of reasons, as is commonly experienced in all workplaces.

34. The Tribunal accepts the evidence presented by Ms Beaumont at the hearing that they currently employ 10 qualified horticulturalists, including the visa applicant. It also accepts her statement that they are constantly recruiting for staff and they need up to 20 horticulturalists to adequately fulfil their contracted work commitments as fact. Retention as Ms Beaumont explained is a substantial issue associated with the transient nature of the Northern Territory population which is exacerbated by harsh climatic conditions. It is also noted by the Tribunal that there are currently approximately 230 employees in the organisation employing Mr Tianza and 60-70 of them operate in the garden and grounds maintenance division.

35. Whilst the Tribunal has some sympathy for the situation the nominator/employer finds itself in through no fault on their part, and it accepts that this may not be ideal, this is not an exceptional circumstance and it is up to the business or the local NT community to provide workable solutions.

36. The Tribunal acknowledges the valuable contribution the visa applicant makes in the form of his charitable works and participation in his local Church. This was emphasised during the hearing and it is accepted that he will be a loss to his community. However, there is no evidence before the Tribunal to suggest that this loss is extraordinary or compelling.

37. The Tribunal does not find that that there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen

38. Therefore, the requirements of PIC 4020(1) should not be waived.

39. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 187.213.

40. The applicant has only sought to satisfy the criteria for a subclass 187 visa in the Temporary Residence Transition Scheme. No claims have been made in respect of the other visa streams. As the requirements that must be met by a person seeking the visa in the Temporary Residence Transition stream have not been met, the decision under review must be affirmed.

41. **Secondary applicant**

- Mrs Veverlyn Ganado Tianza

42. The Tribunal has determined that the secondary applicant is not members of a family unit of a primary applicant who holds a Subclass 187 visa granted on the basis of having satisfied the primary criteria for a Subclass 187 visa.

43. The secondary applicant therefore does not meet cl.187.311.

44. The secondary applicant has only sought to satisfy the criteria for a Subclass 187 visa in the Temporary Residence Transition stream. No claims have been made in respect of the other visa streams. As the requirements that must be met by a person seeking the visa in the Temporary Residence Transition stream, as a secondary applicant have not been met, the decision under review must be affirmed.

DECISION

45. The Tribunal affirms the decisions not to grant the applicants Regional Employer Nomination (Permanent) visas.

Peter Emmerton
Member

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ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
(a) the application for the visa; or
(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:
(a) starting 3 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:
(a) starting 10 years before the application was made; and
(b) ending when the Minister makes a decision to grant or refuse to grant the visa;
neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
(a) compelling circumstances that affect the interests of Australia; or
(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
justify the granting of the visa.

(5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:
(a) false or misleading at the time it is given; and
(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…